

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JENNY ROCHA, O/B/O A.R., MINOR	)	
CHILD,	)	No. CV-11-3006-CI
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT
v.	)	AND REMANDING FOR AWARD OF
	)	BENEFITS
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 17, 19.) Attorney D. James Tree represents Jenny Rocha, on behalf of A.R., a minor child (Plaintiff); Special Assistant United States Attorney Leisa Wolfe represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and **REMANDS** the matter to the Commissioner for an immediate award of benefits.

**JURISDICTION**

Plaintiff protectively filed for Supplemental Security Income (SSI) on August 22, 2007. (Tr. 13; 103.) Her claim was denied initially and on reconsideration. (Tr. 61-85.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on January 21, 2009, before ALJ Gene Duncan. (Tr. 34-58.) At the

1 hearing, medical expert Marian Sherman, M.D., and Plaintiff's  
2 mother, Jenny Rocha, testified. (Tr. 51-59.) The ALJ denied  
3 benefits on August 14, 2009, and the Appeals Council denied review.  
4 (Tr. 1-5; 13-29.) The instant matter is before this court pursuant  
5 to 42 U.S.C. § 405(g).

6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript  
8 of proceedings and are briefly summarized here. At the time of the  
9 hearing, Plaintiff was almost nine years old. (Tr. 137.)  
10 Plaintiff's mother testified that Plaintiff was in the second grade,  
11 and explained she was a year behind because she repeated first  
12 grade. (Tr. 38.) Plaintiff's mother reported that her daughter was  
13 still behind her peers, and Plaintiff had significant trouble with  
14 reading, writing and math. (Tr. 38-39.) Plaintiff's aunt tutored  
15 Plaintiff weekly, and Plaintiff was in special education classes.  
16 (Tr. 38.) Plaintiff also was overweight and suffered from severe  
17 eczema. (Tr. 41; 49.) Plaintiff's mother testified that Plaintiff  
18 has trouble focusing, and she is easily distracted. (Tr. 38.)  
19 Plaintiff's mother described a recent event when Plaintiff became  
20 frustrated, and she shaved off the back of her own hair. (Tr. 44.)

21 **ADMINISTRATIVE DECISION**

22 ALJ Duncan found Plaintiff was a preschooler on August 22,  
23 2006, when the application was filed. (Tr. 16.) The ALJ found  
24 Plaintiff had not engaged in substantial gainful activity at any  
25 time relevant to the decision. (Tr. 16.) The ALJ found Plaintiff  
26 had the following severe impairments: eczema and learning disability  
27 primarily verbal and reading. (Tr. 16.) The ALJ concluded that  
28 Plaintiff did not have an impairment or combination of impairments

1 that meets or medically equals one of the listed impairments in 20  
2 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.924,  
3 416.925 and 416.926.) (Tr. 16.) The ALJ also found that Plaintiff  
4 does not have an impairment or combination of impairments that  
5 functionally equals the Listings (20 C.F.R. §§ 416.924(d) and  
6 416.926a). (Tr. 19.) The ALJ concluded that Plaintiff has not been  
7 disabled since August 22, 2006. (Tr. 29.)

#### 8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
10 court set out the standard of review:

11 A district court's order upholding the Commissioner's  
12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
14 Commissioner may be reversed only if it is not supported  
15 by substantial evidence or if it is based on legal error.  
16 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
17 Substantial evidence is defined as being more than a mere  
18 scintilla, but less than a preponderance. *Id.* at 1098.  
19 Put another way, substantial evidence is such relevant  
20 evidence as a reasonable mind might accept as adequate to  
21 support a conclusion. *Richardson v. Perales*, 402 U.S.  
22 389, 401 (1971). If the evidence is susceptible to more  
23 than one rational interpretation, the court may not  
24 substitute its judgment for that of the Commissioner.  
25 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
26 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,  
28 resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve  
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
31 supports more than one rational interpretation, the court may not  
32 substitute its judgment for that of the Commissioner. *Tackett*, 180  
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).

1 Nevertheless, a decision supported by substantial evidence will  
2 still be set aside if the proper legal standards were not applied in  
3 weighing the evidence and making the decision. *Browner v. Secretary*  
4 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
5 there is substantial evidence to support the administrative  
6 findings, or if there is conflicting evidence that will support a  
7 finding of either disability or non-disability, the finding of the  
8 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
9 1230 (9<sup>th</sup> Cir. 1987).

#### 10 SEQUENTIAL EVALUATION PROCESS

11 To qualify for disability benefits, a child under the age of  
12 eighteen must have "a medically determinable physical or mental  
13 impairment, which results in marked and severe functional  
14 limitations, and which can be expected to result in death or which  
15 has lasted or can be expected to last for a continuous period of not  
16 less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(I). The Social  
17 Security Administration has enacted a three-step sequential analysis  
18 to determine whether a child is eligible for SSI benefits on the  
19 basis of a disability. 20 C.F.R. § 416.924(a). First, the ALJ  
20 considers whether the child is engaged in "substantial gainful  
21 activity." *Id.*, at § 416.924(b). Second, the ALJ considers  
22 whether the child has a "medically determinable impairment that is  
23 severe," which is defined as an impairment that causes "more than  
24 minimal functional limitations." *Id.* at § 416.924(c). Finally, if  
25 the ALJ finds a severe impairment, he or she must then consider  
26 whether the impairment "medically equals" or "functionally equals"  
27 a disability listed in the regulatory "Listing of Impairments." *Id.*  
28 at § 416.924(c)-(d). An impairment is functionally equivalent to a

1 listed impairment if it results in extreme limitations in one area  
2 of functioning or marked limitations in two areas. 20 C.F.R. §  
3 416.926a (a). An impairment is a "marked limitation" if it  
4 "seriously interferes with [a person's] ability to independently  
5 initiate, sustain, or complete activities." 20 C.F.R. §  
6 416.926a(e)(2)(I). By contrast, an "extreme limitation" is defined  
7 as a limitation that "interferes very seriously with [a person's]  
8 ability to independently initiate, sustain, or complete activities."  
9 20 C.F.R. § 416.926a(e)(3)(I).

10 In determining whether an impairment exists, the ALJ assesses  
11 the child's functioning in six domains in terms of his/her ability  
12 to: (1) acquire and use information; (2) attend and complete tasks;  
13 (3) interact and relate with others; (4) move about and manipulate  
14 objects; (5) care for oneself, and (6) his/her general health and  
15 physical well-being. 20 C.F.R. § 416.926a(a)-(b) (2001). To  
16 demonstrate functional equivalence, the child must exhibit a marked  
17 limitation in two of the domains, or an extreme limitation in one  
18 domain. 20 C.F.R. § 416.926a(e)(2)(I).

#### 19 ISSUES

20 Plaintiff argues the ALJ erred by finding she was not disabled.  
21 She maintains she established meeting Listing 112.05D. (ECF No. 18  
22 at 6-7.) Defendant contends the ALJ's decision is supported by  
23 substantial evidence and free of legal error. (ECF No. 20.)

#### 24 DISCUSSION

##### 25 A. Listing 112.05D.

26 Plaintiff argues that she provided evidence that established  
27 she meets Listing 112.05D. (ECF No. 18 at 6-7.) A claimant is  
28 presumptively disabled and entitled to benefits if he or she meets

1 or equals a listed impairment. To "meet" a listed impairment, a  
 2 disability claimant must establish that his condition satisfies  
 3 every element of the listed impairment in question. See *Sullivan v.*  
 4 *Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990);  
 5 *Tackett*, 180 F.3d at 1099. To "equal" a listed impairment, a  
 6 claimant "must establish symptoms, signs, and laboratory findings"  
 7 at least equal in severity and duration to each element of the most  
 8 similar listed impairment. *Id.* at 1099-1100.

9 The ALJ found that Plaintiff's "learning disorder does not meet  
 10 or medically equal the Listing requirements for 112.05 *Mental*  
 11 *Retardation*." (Tr. 16.) The ALJ added: "[i]n this case, there is  
 12 no evidence that the claimant has marked restrictions in any of the  
 13 required areas." (Tr. 18.) The ALJ also found that Plaintiff does  
 14 not meet or medically equal the corresponding adult Listings for  
 15 mental retardation. (Tr. 18.)

16 Listing 112.05D, which relates to assessing mental retardation  
 17 in children, states in pertinent part:

18 Mental retardation refers to significantly subaverage  
 19 general intellectual functioning with deficits in adaptive  
 20 functioning initially manifested during the developmental  
 period; i.e., the evidence demonstrates or supports onset  
 of the impairment before age 22.

21 The required level of severity for this disorder is met  
 22 when the requirements in A, B, C, D, E or F are satisfied.

23 . . .

24 D. A valid verbal, performance, or full scale  
 25 IQ of 60 through 70 and a physical or other  
 mental impairment imposing an additional and  
 significant work-related limitation of function.

26 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 112.05(D). Significantly,  
 27 the Regulations recognize that Listing 112.05 is different from  
 28 other Listings:

1 [t]he structure of the Listing[] for Mental Retardation  
2 (112.05). . . is different from that of the other mental  
3 disorders. Listing 112.05 (Mental Retardation) contains  
4 six [6] sets of criteria. If an impairment satisfies the  
diagnostic description in the introductory paragraph and  
any one of the six sets of criteria, we will find that the  
child's impairments meet the Listing.

5 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 112.00(A). The introductory  
6 paragraph to Listing 112.05 states that mental retardation is  
7 "[c]haracterized by significantly subaverage general intellectual  
8 functioning with deficits in adaptive functioning." See 20 C.F.R.  
9 § 404, Subpart P, Appendix 1, Listing of Impairments ("Listing")  
10 112.05. Plaintiff contends she meets Listing 112.05D. Listing  
11 112.05D is satisfied if Plaintiff establishes "a valid verbal,  
12 performance, or full scale IQ of 60 through 70 and a physical or  
13 other mental impairment imposing an additional and significant  
14 limitation of functioning." *Id.* at 112.05D. Thus, to meet the  
15 requirements of Listing 112.05D, a claimant must establish she meets  
16 three elements: (1) significant subaverage general intellectual  
17 functioning with deficits in adaptive functioning; (2) a valid  
18 verbal, performance or full scale IQ of 60 through 70; and (3) a  
19 physical or other mental impairment imposing additional and  
20 significant work-related limitations of function. 20 C.F.R. Part  
21 404, Appendix 1 (112.00 Mental Disorders).

#### 22 **1. Intellectual Functioning.**

23 According to the diagnostic definition of Listing 112.05,  
24 mental retardation is "characterized by significantly subaverage  
25 general intellectual functioning with deficits in adaptive  
26 functioning." 20 C.F.R. Pt. 404, Subpt P., App. 1, § 112.05.  
27 Plaintiff argues that she established all the criteria necessary to  
28 meet this Listing. (ECF No. 18 at 6-7.) Defendant responds in part

1 that Plaintiff does not meet the Listing because she was not  
2 diagnosed with mental retardation. (ECF No. 20 at 11.) However,  
3 the language of the Listing includes nothing about receiving a  
4 formal diagnosis. Moreover, the case law supports the conclusion  
5 that the analogous Listing 12.05 does not require a formal diagnosis  
6 of mental retardation. See *Christner v. Astrue*, 498 F.3d 790, 793  
7 (8th Cir. 2007) ("We have specifically held that a formal diagnosis  
8 of mental retardation is not required to fall within the confines of  
9 section 12.05"); see also, *Gomez v. Astrue*, 695 F. Supp. 2d 1049,  
10 1057 (C.D. Cal. 2010) ("the absence of a diagnosis of 'mental  
11 retardation' does not preclude plaintiff from meeting section  
12 12.05(C)."). In the absence of authority requiring a formal  
13 diagnosis of mental retardation, the Defendant's argument fails.

14 Additionally, Plaintiff introduced substantial evidence that  
15 she met the diagnostic definition - i.e., she suffers from  
16 subaverage general intellectual functioning with deficits in  
17 adaptive functioning. For example, tests administered by Dr. Toews  
18 revealed Plaintiff's perceptual reasoning abilities fall in the low  
19 average range, verbal abilities fall in the borderline range, and  
20 working memory, a measure of complex attention, concentration, and  
21 cognitive processing ability falls in the extremely low range. (Tr.  
22 219.) The testing also revealed poor verbal comprehension and  
23 extremely poor ability to process and utilize information in  
24 functional ways. (Tr. 220.) Additionally, Plaintiff's high digit  
25 span score led Dr. Toews to hypothesize "she has severe  
26 computational deficits." (Tr. 220.) Finally, Dr. Toews noted  
27 Plaintiff's scores on picture completion and picture arrangement  
28 suggested, "poor visual discrimination, and poor ability to infer



1 cause and effect in social situations, and to sequence events  
2 thematically and/or temporally. She probably has deficiencies in  
3 attention to visual details, and ability to distinguish between  
4 essential and non-essential detail." (Tr. 220.) Dr. Toews also  
5 noted Plaintiff's significant verbal reasoning and cognitive  
6 processing deficits, combined with her family history of chaos and  
7 disruption, along with eczema that severely disrupts her sleep, all  
8 may compound her mental fatigue affecting attention, concentration,  
9 learning and ability to process information. (Tr. 220.) Dr. Toews  
10 concluded Plaintiff's test results indicate "a high probability of  
11 learning disorder(s)." (Tr. 220.)

12 Additionally, on October 9, 2006, Plaintiff's kindergarten  
13 teacher Leslie Huebner, noted Plaintiff had several obvious problems  
14 in attending to and completing tasks. (Tr. 121.) Plaintiff's  
15 mother reported that she gets sidetracked, quickly loses focus, and  
16 cannot finish an activity. (Tr. 38.) Plaintiff is tutored by her  
17 aunt, who observed Plaintiff has trouble comprehending new tasks.  
18 (Tr. 183.) Plaintiff's aunt noted that she is often unable to grasp  
19 the concept of new material, she forgets what she has already  
20 learned, and she has a hard time staying on task and ignoring  
21 distractions. (Tr. 183.) In sum, the record supports a finding  
22 that claimant suffered from subaverage general intellectual  
23 functioning with deficits in adaptive functioning.

## 24 **2. Valid IQ score.**

25 On February 27, 2009, Jay M. Toews, Ed.D., administered several  
26 objective tests to Plaintiff. (Tr. 217-26.) Dr. Toews reported  
27 Plaintiff's IQ test scores from the WISC-III, were: Full Scale IQ  
28 78; Verbal IQ 69; and Performance IQ 93. (Tr. 219.) Dr. Toews

1 noted that the "24 point discrepancy between Performance and Verbal  
2 IQ's is statistically significant, and may be clinically  
3 significant." (Tr. 219.) Dr. Toews did not elaborate. Related to  
4 the IQ scores, Defendant argues that "Dr. Toews indicated that the  
5 IQ scores were 'estimated' because of a 24 IQ point discrepancy  
6 between performance and verbal IQ, which was statistically  
7 significant, and possibly clinically significant." (ECF No. 20 at  
8 11.) However, Dr. Toews did not indicate that Plaintiff's difference  
9 in scores invalidated the results. Also, evidence does not appear  
10 in Dr. Toews' report, or elsewhere in the record, that would allow  
11 an inference that Plaintiff's IQ scores were deemed invalid.  
12 Instead, Dr. Toews noted that Plaintiff's sleep issues and chaos at  
13 home likely affected her, and he opined that Plaintiff has  
14 "significant verbal reasoning and cognitive processing deficits" and  
15 "a high probability of learning disorder(s)." (Tr. 220.) Because  
16 no evidence exists that indicates Plaintiff's IQ scores were  
17 invalid, the record establishes Plaintiff meets this portion of the  
18 Listing with her Verbal IQ score of 69.

19 **3. Physical or other mental impairment**

20 The third requirement of Listing 112.05D requires Plaintiff to  
21 establish a physical or other mental impairment imposing additional  
22 and significant work-related limitations of function. "[A]n  
23 impairment imposes a significant work-related limitation of function  
24 when its effect on a claimant's ability to perform basic work  
25 activities is more than slight or minimal." *Fanning v. Bowen*, 827  
26 F.2d 631, 633 (9th Cir. 1987). In other words, this is the  
27  
28

1 definition of a "severe" impairment.<sup>1</sup> Thus, in this circuit, a  
 2 person who has a severe physical or other mental impairment, as  
 3 defined at step two of the disability analysis, apart from the  
 4 decreased intellectual function, meets the second prong of Listing  
 5 12.05C, and therefore would meet the third prong of Listing 112.05D.<sup>2</sup>  
 6 *Id.*; see also *Hinkle v. Apfel*, 132 F.3d 1349, 1352 (10th Cir. 1997);  
 7 *Edwards v. Heckler*, 736 F.2d 625, 629-31 (11th Cir. 1984); *Nieves v.*  
 8 *Secretary of Health & Human Servs.*, 775 F.2d 12, 14 & n.7 (1st Cir.  
 9 1985)). Because the ALJ found at step two that Plaintiff had severe  
 10 impairments of eczema and learning disabilities, Plaintiff meets the  
 11 final requirement of Listing 112.05D. A review of the record  
 12 reveals substantial evidence establishing Plaintiff's impairments  
 13 meet Listing 112.05D. The ALJ erred by finding Plaintiff was not

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15 <sup>1</sup> See also 20 C.F.R. Pt. 404, Subpt. P, App. 1, §  
 16 12.00(A)("[f]or [Listing 12.05C], we will assess the degree of  
 17 functional limitation the additional impairment(s) imposes to  
 18 determine if it significantly limits your physical or mental ability  
 19 to do basic work activities, i.e., is a 'severe' impairment(s), as  
 20 defined in §§ 404.1520(c) and 416.920(c).")

21 <sup>2</sup>"The statutory standard for child disability is explicitly  
 22 linked to this functional, individualized standard for adult  
 23 disability." *Sullivan*, 493 U.S. at 529. "A child is considered to  
 24 be disabled "if he suffers from any . . . impairment of comparable  
 25 severity" to one that would render an adult "unable to engage in any  
 26 substantial gainful activity." 42 U.S.C. § 1382c(a)(3)(A) (1982  
 27 ed.). *Id.*

1 disabled.

2 **B. Remedy.**

3 The decision to remand for further administrative proceedings  
4 or to reverse and award benefits is within the discretion of the  
5 court. *Benecke v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir. 2004).  
6 Applying the Regulations to the fully developed record and the ALJ's  
7 findings, it is clear Plaintiff meets Listing 112.05(D); further  
8 administrative proceedings would serve no useful purpose and remand  
9 for an award of benefits is appropriate. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**ECF No. 17**) is  
12 **GRANTED** and the matter is remanded to the Commissioner for an  
13 immediate award of benefits.

14 2. Defendant's Motion for Summary Judgment (**ECF No. 19**) is  
15 **DENIED**;

16 3. An application for attorney fees may be filed by separate  
17 motion.

18 The District Court Executive is directed to file this Order and  
19 provide a copy to counsel for Plaintiff and Defendant. Judgment  
20 shall be entered for Plaintiff, and the file shall be **CLOSED**.

21 DATED October 16, 2012.

22  
23 S/ CYNTHIA IMBROGNO  
24 UNITED STATES MAGISTRATE JUDGE  
25  
26  
27  
28